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No. 99-150

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
SAMARA BROTHERS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR ASHLEY FURNITURE INDUSTRIES, INC.; DONGHIA FURNITURE/TEXTILES, LTD.; DRAPER-DBS, INC.; DREXEL HERITAGE FURNITURE COMPANY; EMECO, INC.; FOUNDATION FOR DESIGN INTEGRITY; IMAGINEERING, INC.; L & J.G. STICKLEY, INC.; LANDSCAPE FORMS, INC.; 1168983 ONTARIO, LTD.; PEBBLE BEACH CO.; PETE'S STEAKHOUSE, INC.; PINEHURST, INC.; TACO CABANA, INC.; AND WILLITTS DESIGNS INTERNATIONAL, INC. AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Court limited its grant of review to the following question:

What must be shown to establish that a product's design is inherently distinctive for purposes of Lanham Act trade-dress protection?

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In accordance with Rule 37 of the Rules of this Court, the *amici curiae* submit this brief in support of respondent. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Counsel for *amici curiae* authored this brief in its entirety, and no other person or entity, besides *amici curiae*, has made a monetary contribution to the preparation of this brief.

INTEREST OF *AMICI CURIAE*

Amici curiae consist both of a trade association with members that design a wide variety of products and of numerous enterprises, both large and small, old and new, market leaders and relatively new entrants that offer a variety of products and services, including architectural services, carpets, clocks, commercial and home office amenities, cabinets, commercial/retail/mall site furnishings, fabrics, golf course services, high-end outdoor furniture, home furnishings, interior design and decorating services, interior furniture, lighting and lamps, restaurant services, a variety of collectibles, and wallpaper. *Amici* have a common interest in this case because each seeks to distinguish its broad range of products or services with trade dress making them readily distinguishable from its competitors' products and services. *Amici* spend considerable time and money in selecting such trade dress and spend even more time and money in using it as a means of distinguishing their products and services. It is, therefore, important to *amici* that this Court adopt a sensible and workable standard for granting immediate protection for inherently distinctive product designs under the Lanham Act.

SUMMARY OF ARGUMENT

This Court should adopt the test set forth in *Seabrook Foods, Inc.* v. *Bar-Well Foods Ltd.*, 568 F.2d 1342 (C.C.P.A. 1977), as the test to determine whether trade dress is inherently distinctive and thus entitled to immediate trade dress protection under the Lanham Act. This test—which accords protection to trade dress that is "unique or unusual in a particular field," *id.* at 1344, but not to common or merely refined trade dress—is intelligible and familiar to businesses, to federal courts, and to the United States Patent and Trademark Office. In addition, it reflects the manner in which members of the business community operate in attempting to build their businesses on distinctive trade dress, and it will allow consumers to distinguish the products and services of businesses using distinctive trade dress from those of their respective competitors.

I. Although petitioner argues that product designs should be protectable only upon proof of secondary meaning—saying, in essence, that *nothing* can be shown to establish a product design as inherently distinctive—this argument fails on several fronts. To begin with, the effort to cobble together a statutory argument to that effect, by pointing to the terms used in §§ 23(c) and 45 of the Lanham Act, simply does not work: nothing in the Act suggests that the "marks" listed in § 23(c)—which include virtually everything that qualifies for protection under the Lanham Act—cannot be deemed inherently distinctive, nor is there any basis for concluding that the term "configuration of goods" is somehow excluded from the definition of the term "trademark" in § 45. To the contrary, as this Court has recently recognized, that definition has long received a broad, inclusive construction, and in 1988 Congress declined to narrow the definition, thereby deliberately leaving undisturbed certain terms (*i.e.*, "symbol, or device") that had been historically applied to shapes and configurations. *See, e.g., Qualitex Co.* v. *Jacobson Prods. Co.*, 514 U.S. 159, 172 (1995). Finally, the theory offered by petitioner would, if accepted, effectively require the overruling of *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U.S. 763 (1992), which recognized immediate protection for trade dress that, under this theory, would be entitled to protection only after a showing of secondary meaning.

II. The *Seabrook* test—granting protection to trade dress that is "unique or unusual in a particular field"—

provides a sensible, workable standard that is recognized by the Patent and Trademark Office and by various federal courts. Unlike other tests (*e.g.*, whether a trade dress is "likely to be understood" as an identifier of source), it asks an ultimate, rather than a preliminary, question and, at the same time, provides a comprehensible basis for answering it. Producers and their competitors, therefore, can utilize the standard to determine, with a reasonable degree of assurance, whether a product design so stands out from other product designs that it is entitled to immediate protection. Moreover, the *Seabrook* test, by its very simplicity, avoids the need to venture into confusing side issues such as whether a particular trade dress amounts to product design or packaging, whether the design primarily serves an aesthetic or source-identifying function, or whether the design is "conceptually separable" from the product itself. These almost metaphysical inquiries—usually prominent in courts of appeals that are hostile to immediate protection for trade dress—are of little value and add a needless ambiguity to the process of deciding what product designs do, in fact, serve as indicators of source.

The *Seabrook* test is also consistent with the familiar test for word marks set forth in *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). The *Seabrook* test, like that in *Abercrombie*, groups marks into categories along a sliding scale, ranging from common designs (unprotectable), to modifications of common designs (protectable with secondary meaning), to truly unique and unusual designs (immediately protectable). These categories mirror, in substance, the continuum of word marks—from generic to descriptive to suggestive, arbitrary, and fanciful—without, however, bringing into play the conceptual difficulties of applying terms fashioned for word marks to physical objects.

III. The *Seabrook* test provides important benefits to businesses and competitors alike. This Court has noted that immediate protection for inherently distinctive trade dress allows businesses, particularly start-up businesses, to generate and secure goodwill for their products. *See Two Pesos*, 505 U.S. at 771, 774. The *Seabrook* test accords that protection to truly unique and unusual product designs. At the same time, it leaves competitors free to copy trade dress that is commonplace in the field or represents only a modest departure from common designs. Furthermore, under the *Seabrook* test (or any other), the functionality doctrine gives competitors the right to use even unique and unusual trade dress so long as the trade dress is one of only a few efficient choices and protection of that trade dress would put competitors at a significant non-reputational disadvantage. *See Qualitex*, 514 U.S. at 164-65.

IV. The judgment in this case may be affirmed under the *Seabrook* test. The district court, in finding that respondent's designs were distinctive by comparison to its competitors' designs, specifically relied upon the test. On appeal, the Second Circuit, while not invoking the test by its own terms, nonetheless employed the same reasoning to determine that the trade dress had a "distinctive overall look." Pet. App. 15. Given that analysis, the court of appeals' discussion of respondent's intent—as evidence of the purpose of the trade dress—is essentially beside the point. There is thus no need to remand the case for further proceedings.

ARGUMENT

I. THE LANHAM ACT PROTECTS INHERENTLY DISTINCTIVE PRODUCT DESIGNS WITHOUT PROOF OF SECONDARY MEANING

A. The Trademark Act of 1946 (the "Lanham Act") is the federal trademark statute. 15 U.S.C. §§ 1051-

1127. The Lanham Act prohibits the unauthorized use of a federally registered or unregistered trademark or trade dress. *See Qualitex*, 514 U.S. at 164; *Two Pesos*, 505 U.S. at 766-69; 15 U.S.C. §§ 1114(1), 1125(a). As the term has been used by this Court, "[t]he 'trade dress' of a product is essentially its total image and overall appearance." *Two Pesos*, 505 U.S. at 764 n.1 (internal quotation marks omitted). "It 'involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.'" *Id.* (quoting *John H. Harland Co.* v. *Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983)).

"The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *accord Two Pesos*, 505 U.S. at 782 n.15 (Stevens, J., concurring). As this Court explained in *Qualitex*, the Lanham Act, by prohibiting infringement, "assure[s] a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product," 514 U.S. at 164; it "thereby encourage[s] the production of quality products and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of the item offered for sale." *Id.* Moreover, by barring the unauthorized use of a mark, the Act "reduce[s] the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that *this* item—the item with the mark—is made by the same producer as other similarly marked items that he or she liked (or

disliked) in the past." *Id.* at 163-64 (internal quotation marks omitted).

Given the purposes of the Lanham Act—source identification and the preservation of goodwill—it is well-settled that, to prevail on a claim for infringement, a plaintiff must prove, among other things, that its mark or trade dress is sufficiently distinctive, *i.e.*, that it serves as an identifier of source to consumers. *See, e.g., Two Pesos*, 505 U.S. at 769. If consumers are likely to assume from the outset that a mark or trade dress serves as an identifier of source, it is "inherently distinctive" and granted immediate protection. *See, e.g., id. at* 768-69, 773-74. Otherwise, the Act provides protection only if it in fact functions in that manner—that is, if it acquires "secondary meaning." *See id.*

These principles apply both in deciding whether a mark or dress is entitled to protection for infringement and in determining whether it is eligible for federal registration on either the "Principal Register" or the "Supplemental Register." *See id.*; 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 19:42 (4th ed. 1999) [hereafter "McCarthy"]. Specifically, § 2 of the Lanham Act provides for federal registration on the "Principal Register" of a "trademark" that is either inherently distinctive or has acquired secondary meaning.[1] *See Qualitex*, 514 U.S. at 162-63; *Two Pesos*, 505 U.S. at 768-69; 1 McCarthy § 7:94; 3 McCarthy §§ 19:10, 19:42. A trademark that meets neither of those conditions, but that might in the future acquire secondary

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[1] The term "trademark" is defined in § 45 as follows: "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127.

meaning, is registrable only on the "Supplemental Register."[2] *See* 3 McCarthy § 19:42; 2 McCarthy § 11:51. Once a trademark that is on the Supplemental Register acquires secondary meaning, it becomes registrable on the Principal Register. *See* 3 McCarthy § 19:42.

It has long been understood that inherently distinctive trade dress, including inherently distinctive packaging and product designs, is encompassed within the meaning of the term "trademark" in § 45—and thus registrable on the Principal Register—without proof of secondary meaning. The United States Patent and Trademark Office ("PTO") has taken that position for more than 30 years, and numerous courts, including the Federal Circuit and its predecessor (granted special jurisdiction to review PTO decisions), have endorsed it. *See generally* 1 McCarthy § 7:94. Furthermore, this Court in *Two Pesos,* in concluding that inherently distinctive trade dress—like an inherently distinctive word mark—is protectable under § 43(a) of the Lanham Act without proof of secondary meaning, stated flatly that there is no "textual basis" in the Lanham Act "for treating inherently distinctive verbal or symbolic trademarks differently from inherently distinctive trade dress." 505 U.S. at 774. As a result, "[if] a package, container or product configuration is inherently distinctive, it is registrable on the Principal Register with-

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[2] Section 23 of the Lanham Act provides for a Supplemental Register for "all *marks* capable of distinguishing applicant's goods or services and not registrable on the principal register herein provided." 15 U.S.C. § 1091(a) (emphasis added). The term "marks" is defined in § 23(c) as follows: "[f]or the purpose of registration on the supplemental register, a mark may consist of any trademark, symbol, label, package, configuration of goods, name, word, slogan, phrase, surname, geographical name, numeral, device, any matter that as a whole is not functional, or any combination of any of the foregoing, but such mark must be capable of distinguishing the applicant's goods or services." *Id.* § 1091(c).

out any proof of secondary meaning." 1 McCarthy § 7:94.

B. Notwithstanding this accepted practice and authority, petitioner now contends (Br. 11-14) that certain trade dress ("product configuration" trade dress) cannot be protected under § 43(a) of the Lanham Act or registered on the Principal Register without proof of secondary meaning. Although the exact nature of this argument is somewhat unclear, the theory rests almost entirely on the observation that § 23(c) of the Act includes the term "configuration of goods" as part of the definition of "marks" registrable on the Supplemental Register. But that fact plainly does not mean that a "configuration of goods" cannot be inherently distinctive (or immediately registrable on the Principal Register): other categories of "marks" listed in § 23(c) include "symbol[s]," "name[s]," "word[s]," "slogan[s]," and "device[s]"—indeed virtually the entire range of protectable marks—all of which can be inherently distinctive and registered, without proof of secondary meaning, on the Principal Register. The definition of "marks" thus does not serve, and is not intended to serve, as a means of separating categories of marks that can be inherently distinctive from categories of marks that cannot.[3]

There is also nothing to be read into the fact that the definition of "marks" lists "trademark" and "configuration of goods" separately. Although petitioner tries to suggest that this alternative usage has some meaning—saying that it "plainly distinguished between 'trade-marks' and 'configuration of goods'" (Br. 17)—the only possible meaning that petitioner might have in mind is that the two

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[3] The predominant, if not sole, aim of establishing the Supplemental Register was to enable Americans to obtain trademark protection in foreign nations that required some kind of domestic registration as a precondition. *See* 3 McCarthy § 19:33.

categories of marks are mutually exclusive: *i.e.*, that a configuration of goods is not (and cannot be) a trademark. If this were right, however, it would lead to the conclusion that a configuration of goods cannot be protected at all, even with proof of secondary meaning—a position that is at odds with petitioner's own theory as well as the necessary implications of § 23(c). In any event, the suggestion is manifestly not right: many of the other classes of marks included in § 23(c)—for example, "word[s]," "symbol[s]," and "device[s]"—are obviously trademarks under any theory, having been expressly included in the definition of "trademark" in § 45. The separate listing of various marks in § 23(c) thus does not mean that one may not be included in another.

For related reasons, it does not matter that the term "configuration of goods" is not expressly set forth in the definition of "trademark" in § 45. Again, all this omission could mean for purposes of petitioner's argument is that a configuration cannot be a trademark under any circumstances, and petitioner, as we have noted, does not argue that. Furthermore, as this Court observed in *Qualitex*, § 45 defines the universe of things that can qualify as a trademark "in the broadest of terms . . . . Since human beings might use as a 'symbol' or 'device' almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive." 514 U.S. at 162. And, in 1988, Congress deliberately elected to retain the words "symbol" and "device" in § 45 "so as not to preclude the registration of colors, *shapes*, sounds, or *configurations* where they function as trademarks." *Qualitex*, 514 U.S. at 172 (emphasis added) (quoting S. Rep. No. 100-515, 100th Cong., 2d Sess. 36 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5577, 5607).[4]

[4] This purposeful choice by Congress in 1988 demonstrates its recognition that, in the dynamic late-century marketplace, a wide variety of marks serve as identifiers of source. Even if that was less true in the marketplace of the late 1930s, there is no indication in § 23(c), or in the legislative history of that section (Pet. Br. 16-17), that Congress meant to lock into place the prevailing practices at that time.

In short, nothing in § 23(c) or in § 45, or in the two sections taken together, is reasonably read to declare that a configuration of goods is protectable only upon a showing of secondary meaning. Indeed, in the well-known case, *In re International Playtex Corp.*, 153 U.S.P.Q. 377, 378 (T.T.A.B. 1967), the TTAB expressly rejected essentially the same argument now advanced by petitioner, holding that an ice cream cone shaped "package" was registrable on the Principal Register without proof of secondary meaning, even though the term "package" was included in § 23(c) but not in the definition of "trademark" in § 45. In keeping with that decision, the PTO has registered numerous product designs on the ground that they were inherently distinctive. *See* 1 McCarthy § 7:94; Arthur Seidel, *The Procurement of Trademark Registrations For The Configuration of Three Dimensional Articles*, C461ALI-ABA 109 at 128 n.8 (1989). Petitioner's effort to turn back the clock is too little, too late.

Finally, we note that the argument advanced by petitioner would effectively require the Court to overrule its decision in *Two Pesos*. In that case, this Court held that inherently distinctive trade dress (there, a Mexican restaurant decor) was protectable under § 43(a)—and thus registrable on the Principal Register under § 2 (which, in turn, incorporates the term "trademark" as defined in § 45)—without proof of secondary meaning. *See* 505 U.S. at 765, 768-69, 772-74. Although the Court did not

expressly determine whether the trade dress at issue was "product configuration" or "product packaging," it was plainly one or the other.[5] If petitioner were right about the interplay between §§ 23(c) and 45, however, it would mean that this Court was wrong to accord immediate protection to that trade dress, because *both* the term "package" and the term "configuration of goods" are found in § 23(c), but not in § 45. There is no reason to revisit the holding in *Two Pesos*: the Lanham Act gives immediate protection to inherently distinctive trade dress, without proof of secondary meaning, regardless of whether it is characterized as packaging or product design.[6]

In short, the statutory argument made by petitioner is incorrect and should be rejected. With that out of the way, the case thus turns on the question posed by the Court: "What must be shown to establish that a product's design is inherently distinctive for purposes of Lanham Act trade-dress protection?" We discuss that issue in the following sections.

II. THIS COURT SHOULD ADOPT THE STANDARD SET FORTH IN *SEABROOK*

A. We believe that the proper standard for determining whether trade dress is inherently distinctive is the standard set forth in *Seabrook*: whether the trade dress is

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[5] *Compare Ashley Furniture Indus., Inc.* v. *Sangiacomo N.A. Co.*, 187 F.3d 363, 370 (4th Cir. 1999) *and Stuart Hall Co.* v. *Ampad Corp.*, 51 F.3d 780, 788 (8th Cir. 1995) *with Duraco Prods., Inc.* v. *Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1442 (3d Cir. 1994).

[6] Since the decision in *Two Pesos*, the courts of appeals have uniformly held that inherently distinctive product designs are protectable under § 43(a), without proof of secondary meaning. *See, e.g., Ashley*, 187 F.3d at 370-75; *I.P. Lund Trading ApS & Kroin, Inc.* v. *Kohler Co.*, 163 F.3d 27, 39-41 (1st Cir. 1998); *Insty*Bit, Inc.* v. *Poly-Tech Indus., Inc.*, 95 F.3d 663, 666, 673 (8th Cir. 1996); *Dorr-Oliver, Inc.* v. *Fluid-Quip, Inc.*, 94 F.3d 376, 379-80 (7th Cir. 1996); *Imagineering, Inc.* v. *Van Klassens, Inc.*, 53 F.3d 1260, 1263-64 (Fed. Cir. 1995); *Stuart Hall*, 51 F.3d at 784-88; *Duraco*, 40 F.3d at 1446, 1448-51.

"unique or unusual in a particular field." 568 F.2d at 1344. As the court in *Seabrook* observed, the general question to be asked is whether a particular trade dress "makes such an impression on consumers that they will assume [plaintiff] to be the source of the goods upon seeing a similar design on identical or closely related goods." *Id.* To answer this question, the court then conducted an inquiry of three related parts, looking to whether the trade dress at issue is "a 'common' basic shape or design, whether it [is] unique or unusual in a particular field, or whether it [is] a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods." *Id.* If a trade dress is "unique or unusual in a particular field"—in the sense that it is readily identifiable from all other competitive trade dresses—then it is inherently distinctive, and protectable without proof of secondary meaning, because it will automatically be perceived by customers as an indicator of origin. *See id.* at 1344-45; *Ashley Furniture Indus., Inc.* v. *Sangiacomo N.A. Co.*, 187 F.3d 363, 371, 374-75 (4th Cir. 1999); *I.P. Lund Trading ApS & Kroin, Inc.* v. *Kohler Co.*, 163 F.3d 27, 40-41 (1st Cir. 1998); *Landscape Forms, Inc.* v. *Columbia Cascade Co.*, 113 F.3d 373, 378 n.3 (2d Cir. 1997); 1 McCarthy § 8:13. If, on the other hand, a trade dress is merely a "refinement on a commonly-adopted theme" or a "common basic shape of design," it is not inherently distinctive, and can be protected, if at all, only upon proof of secondary meaning. *Id.; see Wiley* v. *American Greeting Corp.*, 762 F.2d 139, 141-42 (1st Cir. 1985).

This basic test—whether trade dress is "unique or unusual in a particular field"—provides a standard that is helpful to litigants and easy for the federal courts and the PTO to administer. First and foremost, by linking in-

herent distinctiveness to whether a particular trade dress is readily identifiable from all other competitive trade dress, the *Seabrook* test formulates the relevant inquiry in a manner that provides an immediate basis for resolving it: protection hinges, not on application of some abstract concept, *e.g.*, "is this design capable of being a source identifier?", but on an *objective comparison* of the trade dress at issue and competing trade dresses in the marketplace. *See Landscape*, 113 F.3d at 378 n.3. The test is therefore immediately useful to litigants and courts, because it identifies, in concrete terms, what actually makes a trade dress inherently distinctive.

This focus on the ultimate question makes the *Seabrook* test stand out from many of the competing tests for determining inherent distinctiveness. Various courts of appeals have adopted legal standards that, while serving to frame the issue, do not explain how to determine whether a particular trade dress meets the standard. For example, to be inherently distinctive in the Fourth Circuit, a trade dress must be "capable of identifying a product," *Ashley*, 187 F.3d at 372 (internal quotation marks omitted); in the Second Circuit, it must be "likely to be understood as an indicator of the product's source," *Landscape*, 113 F.3d at 378; and, in the Third Circuit, it must be "likely to serve primarily as a designator of origin of the product," *Duraco Prods., Inc.* v. *Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1448-49 (3d Cir. 1994). But these tests pose the governing legal standard at such a high level of generality that they necessarily require still further inquiries in order to identify what renders a trade dress "capable of identifying a product," "likely to be understood as an indicator of the product's source," or "likely to serve primarily as a designator of origin of the product." *See* U.S. Br. 27-28. These tests, therefore, simply postpone the critical inquiry —the inquiry posed immediately by the *Seabrook* test—

and leave litigants and courts pondering how to determine whether a particular trade dress is or is not inherently distinctive.

In addition to asking an ultimate (rather than a preliminary) question, the *Seabrook* test articulates a legal standard that is plainly intelligible to businesses and courts: is the overall appearance of the trade dress in question so unique or unusual that it is readily identifiable among its peers? If it is, then the trade dress is inherently distinctive. *See Krueger Int'l, Inc.* v. *Nightingale, Inc.*, 915 F. Supp. 595, 603 (S.D.N.Y. 1996) ("The *Seabrook* test is the most useful . . . because it clarifies the importance of market context."); *id.* ("Any test of inherent distinctiveness must ask 'Inherently distinctive as compared to what?' "). In this regard, the *Seabrook* standard mirrors what businesses do on a daily basis in designing products to bring to market, and businesses are thus particularly well-positioned to apply it without the need for expert guidance. As Chief Judge Posner of the Seventh Circuit put it: "Everyone can recognize when a product has a 'distinctive' appearance, without having been tutored in the meaning of 'distinctiveness.' " *Publications Int'l, Ltd.* v. *Landoll, Inc.*, 164 F.3d 337, 339 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1498 (1999).[7]

Given that the *Seabrook* test asks a practical, understandable question that makes sense for product designs, it is not surprising that many federal courts and the PTO have turned to it in order to answer whether a particular product design is an inherently distinctive trade dress.

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[7] Consistent with this observation, the PTO requires for registration on the Principal Register a pictorial depiction to identify the product design. In addition, the PTO requires a description in words, but admonishes that it should be kept "to a minimum." *See* United States Department of Commerce, Patent and Trademark Office, *Trademark Manual of Examining Procedure* § 1202.03(c) (2d ed. rev. 1:1, April 1997).

Indeed, the *Seabrook* standard has been applied by the federal courts and the PTO for more than twenty years without difficulty. *See, e.g., Ashley,* 187 F.3d at 371, 374-75; *Tone Bros., Inc.* v. *Sysco Corp.*, 28 F.3d 1192, 1205-06 (Fed. Cir. 1994); *Ambrit, Inc.* v. *Kraft, Inc.*, 812 F.2d 1531, 1536-37 (11th Cir. 1986); *Wiley,* 762 F.2d at 141-42; *In re Hudson News,* 39 U.S.P.Q.2d 1915, 1921-25 (T.T.A.B. 1996). The federal courts, the PTO and litigants have had extensive experience with the *Seabrook* test and have deemed it a workable and fair test for resolving the issue of what makes a trade dress inherently distinctive. The *Seabrook* standard, therefore, has the added virtues of familiarity and predictability.[8]

B. The *Seabrook* test is also consistent with a well-established body of legal doctrine concerning the protectability of word marks under the Lanham Act. By adopting the *Seabrook* standard, therefore, this Court would provide substantially uniform standards of protection under the Lanham Act. This uniformity is in keeping with the statutory scheme as a whole: as the Court noted in *Two Pesos,* 505 U.S. at 773, "the protection of trademarks and trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition."

The protection of word marks under the Lanham Act is commonly determined by reference to the "classic formulation" set out by Judge Friendly in *Abercrombie,* 537

[8] In its amicus brief, the AIPLA also argues that this Court should adopt the *Seabrook* test. In addition, however, it states (Br. 4) that this Court should permit consideration of other evidence "tending to show" that the particular product design trade dress would serve as a source identifier. We agree with this suggestion to the extent that it would allow for a wide range of evidentiary showings that a particular trade dress is unique and unusual in its particular field. But, insofar as this evidence might lead to an overriding of the standard itself—*i.e.*, granting protection to trade dress that is not unique or unusual, or denying protection to trade dress that is unique or unusual—we think that any departure from the approach set forth in *Seabrook* is both unnecessary and unwise.

F.2d at 9-11. *Two Pesos*, 505 U.S. at 768. Under *Abercrombie*, marks are divided into five categories under a sliding scale of distinctiveness, *i.e.*, fanciful, arbitrary, suggestive, descriptive and generic. Marks that are fanciful, arbitrary or suggestive are inherently distinctive and immediately protectable, without regard to secondary meaning, "because their intrinsic nature serves to identify a particular source of a product." *Id.* On the other hand, marks that are "merely descriptive" of the underlying product require proof of secondary meaning in order to be protectable. *Id.* at 769. Marks that are generic, *i.e.*, those that refer to a genus of which the particular product is a species, are not protectable marks at all. *Id.* at 768.

Words, like product designs, range along a spectrum from the common to the highly unusual. For example, given that inherently distinctive word marks do not just describe attributes of the underlying product, they are likely to be uncommon in the market for competitive products. The *Abercrombie* formulation presumes that word marks are inherently distinctive if they are "unique" or "unusual" in the sense that they are likely to stand out from the crowd. *See, e.g., Fisions Horticulture, Inc.* v. *Vigoro Indus., Inc.*, 30 F.3d 466, 478-79 (3d Cir. 1994); *Wynn Oil Co.* v. *Thomas,* 839 F.2d 1183, 1190 n.4 (6th Cir. 1988). Conversely, the *Abercrombie* standard withholds immediate protection to merely descriptive and generic word marks "because their common occurrence makes it difficult for them to stand out as source identifiers." 2 McCarthy § 11:87; *accord* 1 McCarthy § 7:23. The classification scheme thus serves as a sorting mechanism, singling out for immediate protection those word marks that are unique and unusual among their peers (and thus likely to serve as source identifiers), and withholding immediate protection for those word marks that are common in the competitive market (and thus not likely to be viewed as source identifiers).

The *Seabrook* test is consistent with this basic continuum. Like the *Abercrombie* formulation, the *Seabrook* test uses a sliding scale of distinctiveness to determine whether a trade dress is inherently distinctive and protectable without proof of secondary meaning. Shapes or designs that are widely used within a particular field, like generic words, receive no protection; common shapes or designs that are not widely used in a particular field or minor variations on an existing shape or design in a particular field, like merely descriptive words, are protected only with secondary meaning; and unique or unusual designs in a particular field, like suggestive, arbitrary or fanciful words, receive immediate protection without proof of secondary meaning. Moreover, the *Seabrook* test performs the same sorting function as the *Abercrombie* test, and in essentially the same way: by asking whether a particular trade dress is so unique and unusual that it is readily identifiable from all other competitive trade dress, the *Seabrook* test—like that in *Abercrombie*—identifies for immediate protection trade dress that so stands out from the crowd that it will automatically serve to identify source. Accordingly, it has been recognized that the approach taken in *Seabrook* is consistent with the classifications set forth in *Abercrombie*. *See Stuart Hall Co.* v. *Ampad Corp.*, 51 F.3d 780, 786 (8th Cir. 1995) (stating that *Seabrook* is a "widely adopted standard, based on *Abercrombie* classifications"); *see also* Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. Rev. 471, 513 (1997) [hereafter "Dinwoodie"] ("*Seabrook*, which measures industry rather than lexicographic significance, is arguably even more attuned to consumer perception than verbal mark analysis by virtue of its express market orientation.").

The *Seabrook* test, however, avoids the pitfalls of trying to apply *Abercrombie* literally to product designs. As the

Third Circuit has explained, product designs are fundamentally different from word marks in that there is no "dialectical" relationship between the trade dress and the underlying product. *Duraco*, 40 F.3d at 1440-41. It thus "makes little sense" to apply the *Abercrombie* linguistic terms to product designs by asking, for example, whether a particular product configuration for a chair "describes" the chair or "suggests" the chair. *Knitwaves, Inc.* v. *Lollytogs Ltd.*, 71 F.3d 996, 1007 (2d Cir. 1995); *Krueger*, 915 F. Supp. at 601. For that reason, Professor Dinwoodie has stated that the *Abercrombie* formulation "is ill-suited to determine the inherent distinctiveness of shapes generally and of product design in particular." Dinwoodie at 509; *see also* U.S. Brief 16.

It is true that a few courts have tried to strictly apply the linguistic analysis in *Abercrombie* to product designs. *See, e.g., Pebble Beach Co.* v. *Tour 18 I Ltd.*, 155 F.3d 526, 540-41 (5th Cir. 1998); *Lainer* v. *Bandwagon, Inc.*, 983 F. Supp. 292, 300-01 (D. Mass. 1997). But the awkward reasoning of those decisions serves only to illustrate the problems inherent in applying the test out of its natural context. Using the *Abercrombie* classifications, each court ultimately held that the particular product design had to be regarded as "merely descriptive" because consumers would know immediately what they were looking at. *See Pebble Beach*, 155 F.3d at 540-41 (golf course design); *Lanier*, 983 F. Supp. at 300-01 (back scratcher).[9] But this conclusion could be reached about virtually *any* product design: a product design that kept consumers in

[9] In the *Pebble Beach* case, for example, the Fifth Circuit reasoned that, under *Abercrombie*, the overall design of a golf hole could not be "arbitrary" or "fanciful" because a golf hole is the product itself, and thus the design bears a relationship to the product, and could not be "suggestive" because a golfer looking at a golf hole knows that he is looking at a golf hole. 155 F.3d at 540-41. Thus, by process of elimination, the court concluded that the golf holes must be "merely descriptive" and not protectable without proof of secondary meaning. *Id.*

the dark about the nature of the product would be doomed to failure in the marketplace. *See* Dinwoodie at 520. Indeed, customers looking at the restaurant decor in *Two Pesos*—a decor that, according to this Court, was entitled to immediate protection under the Lanham Act—would obviously know that they were looking at a Mexican restaurant. Under the linguistic analysis of *Abercrombie*, however, that trade dress would not be inherently distinctive.[10]

We note, in passing, that some courts have sought a middle ground, holding to the literal terms of *Abercrombie* but trying to translate them into more useful criteria. These courts have adopted their own sliding-scale test, providing that if the trade dress reflects an industry custom, it is essentially generic; if the trade dress is one of a few choices, it is descriptive; and if it is one of a large number of choices, then it is inherently distinctive. *See, e.g., Fun-Damental Too, Ltd.* v. *Gemmy Indus. Corp.*, 111 F.3d 993, 1000-01 (2d Cir. 1997); *Kompan, Inc.* v. *Park Structures, Inc.*, 890 F. Supp 1167, 1173-74

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[10] A product design can both tell consumers what a product is *and* serve as an identifier of source. *See* Dinwoodie at 602-03. Purely linguistic analysis of product designs fails to recognize this dual effect, however, because, insofar as it treats product designs as descriptive, it does not allow for the critical determination of whether the overall design is "merely" descriptive (and thus not protectable without secondary meaning) or inherently distinctive (and thus immediately protectable). The key is the word "merely." In word mark cases, even if the producer uses a word as part of a mark that immediately tells the consumer what the product is, secondary meaning is not required if the entire mark is neither generic nor merely descriptive. *See, e.g., Lone Star Steakhouse & Saloon, Inc.* v. *Alpha of Virginia, Inc.*, 43 F.3d 922, 936 (4th Cir. 1995) ("Lone Star Steakhouse" for restaurant services is inherently distinctive); 2 McCarthy § 11:26. Similarly, in product design cases, consumers may know what the product is, but the overall design may still function as a source identifier because, as *Seabrook* and other tests recognize, "product designs" can and do serve "multiple functions." Dinwoodie at 602-03; *infra* p. 22.

(N.D.N.Y. 1995); *see also* 2 McCarthy § 11:68. This form of analysis, unlike more wooden applications of *Abercrombie*, does take account of the differences between words and product designs, as well as looking to the marketplace for practical guidance about the distinctiveness of a particular design. We believe, however, that the *Seabrook* standard—which is fully consistent with, but not confusingly dependent on, the *Abercrombie* formulation—is, by virtue of its familiarity and established use, a more suitable standard to be adopted by this Court.

C. The *Seabrook* test—unlike more abstract and complicated tests utilized by the Second and Third Circuits—also avoids the need to debate various side issues that make the inquiry more confusing. Thus, for example, the *Seabrook* test applies equally to protection of product design and product packaging, obviating a difficult (and, we think, pointless) effort to draw a distinction between the two. Although both the Second and Third Circuits have indicated that packaging should receive greater trade dress protection than product designs, *see Knitwaves*, 71 F.3d at 1007-08; *Duraco*, 40 F.3d at 1448, it is often a bewildering task to tell whether a particular trade dress should be characterized as "product packaging" or "product configuration." *See supra* p. 12, n.5; Dinwoodie at 580-83. Indeed, a particular trade dress often will have characteristics of both product packaging and product configuration, and thus it will be impossible to categorize it as either product packaging or product configuration. *Id.* And, in any event, the entire inquiry is unnecessary because unique or unusual product designs—just like unique or unusual packaging—serve as an indicator of source. *See, e.g., Ashley*, 187 F.3d at 370-75; *I.P. Lund*, 163 F.3d at 39-41; *Imagineering, Inc.* v. *Van Klassens, Inc.*, 53 F.3d 1260, 1263-64 (Fed. Cir. 1995); *Seabrook*, 568 F.2d at 1344-45.

The Third Circuit and, at times, the Second Circuit also have required that a trade dress, to be inherently distinctive, must be "likely to serve *primarily* as a designator of origin of the product." *Knitwaves,* 71 F.3d at 1008 (emphasis added); *Duraco,* 40 F.3d at 1448-49. As one court aptly observed, however, this test "revives a false dichotomy between aesthetics and source identification. *Knitwaves* seems to instruct that a design can serve only one primary purpose: either aesthetic or source-identifying, but not both. This approach is neither helpful or logical." *Krueger,* 915 F. Supp. at 606 (citation omitted); *see also* Dinwoodie at 552 ("Any test that defines distinctiveness of a useful product's configuration in terms of primary purpose will drift toward the establishment of false dichotomies among aesthetics, function and source identification."). There is no good reason under the Lanham Act to deny the benefits of immediate protection to a unique and unusual product design simply because it can serve *both* an aesthetic purpose and a source-identifying purpose. *See, e.g., Ashley,* 187 F.3d at 375; *Fabrication Enters., Inc.* v. *Hygenic Corp.,* 64 F.3d 53, 55 (2d Cir. 1995). *See generally* Dinwoodie at 602-03 ("In the modern consumer marketplace product design features may simultaneously serve many purposes, including aesthetic, functional, and identificatory. Product designs can and do serve to identify the source of products . . . . Trademark law must accept that reality and refrain from relegating product design trade dress to a second-class status."). There is even less reason to put businesses through the tortuous process of establishing what purpose is "primary." *See* Dinwoodie at 541-45; U.S. Brief 27-28.

Finally, the Third Circuit has held that, for a product design to be inherently distinctive, it must be "conceptually separable" from the product. *Duraco,* 40 F.3d at 1449-50. But this requirement borders on the illusory. The notion of conceptual separability is a legal requirement imported from copyright law, and it is one that has "bedeviled" courts. *See* Dinwoodie at 539-41 & n.197. Indeed, its place in trade dress law seems to be mostly as a hurdle that is extraordinarily difficult for certain owners of trade dress to clear: the Third Circuit has acknowledged that the requirement should prevent virtually all product designs from being recognized as inherently distinctive because the appearance of a product is part of the product. *Duraco,* 40 F.3d at 1452. But this hostility to inherently distinctive product designs is, once again, out of step with the modern marketplace, where product designs are created to serve, and in fact do serve, as valuable identifiers of source.[11] There is thus no need to borrow an already opaque concept from copyright law and use it to diminish protection for truly unique designs under the Lanham Act.

III. THE *SEABROOK* TEST PROVIDES THE PROPER BALANCE BETWEEN PROTECTION OF PRODUCT DESIGNS AND COMPETITORS' NEED TO COPY

A. The *Seabrook* test leads to a greater certainty that will benefit producers, competitors, and consumers alike. For example, given the straightforward nature of the *Seabrook* inquiry, producers of original product designs should be able to determine inexpensively and reliably whether a particular design will be afforded immediate protection, enabling them to allocate the proper amount of resources to bringing the products to market. In particular, a company will be able to decide whether to invest more resources in a product subject to immediate

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[11] *See* Dinwoodie at 557-58 (The tests developed by the Second and Third Circuits, while "correctly founded on the inappropriateness of *Abercrombie*, are blatant efforts at revisionism. They ignore the teachings of *Two Pesos* and effectively turn back the clock to the days before product configurations were welcomed, on the basis of their operation in the marketplace, into the fold of source-identification.").

trade dress protection than to a product subject to immediate copying by its competitors. The greater predictability of the *Seabrook* test thus should lead to more efficient investment in product design and marketing. *See generally* William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TM Rep. 267, 271-72 (1988).

The *Seabrook* test also will provide appropriate trade dress protection to small businesses, like several of the *amici* represented here, that develop unique product designs. This Court recognized in *Two Pesos* that the failure to protect truly distinctive trade dress at its inception would be particularly burdensome on the "start-up" of "small companies," because it would fail to protect those owners from the "appropriat[ion]" of their trade dress—and thus from the "unfair prospect of theft [or] financial loss" near the time of market entry—simply on account of "the failure of the user of the dress to be successful enough in the marketplace." 505 U.S. at 771, 774. Immediate protection for such trade dress protects "the owner's legitimate proprietary interest in its unique and valuable informational device" and allows the owner to "maintain what competitive position it has and [to] continue to seek wider identification among potential customers." *Id.* at 770-71. The *Seabrook* test, applied with an eye to the realities of the existing marketplace, permits producers to develop their businesses and improve their competitive position with product designs that stand out from the designs of their competitors, enhancing competition in the long run. *See id.*

Competitors also will benefit by having a test that leads to predictable outcomes. By looking at the "particular field" in which they compete, they should be able to tell relatively easily whether a product design is so notably different from other designs that it—unlike more common designs—is not subject to copying. This increased ability

to identify what is and is not protected will, in turn, lead to reduced costs in designing products. *See, e.g.*, A. Samuel Oddi, *Product Simulation: From Tort to Intellectual Property*, 88 Trademark Rep. 101, 153 (1998). As one commentator has noted, "[t]he ambiguity of the concept [of inherent distinctiveness] is likely to increase transaction costs and have a deterrent effect on competitors entering the market in this particular product, or it may force them to expend additional amounts to make certain of a non-infringing design." *Id.* A test that significantly reduces this "ambiguity" should, in turn, reduce the expenses caused by uncertainty about the scope of protection for a particular product design.

It is important to recognize that, contrary to statements made by Payless (Br. 6), the *Seabrook* test does *not* protect each new product from copying by competitors. Under the *Seabrook* test, there is no protection for a new product that is made up of commonly used shapes or designs. *See, e.g., Hudson News*, 39 U.S.P.Q.2d at 1921-25. In addition, the well-established functionality doctrine specifically addresses the possibility that "the initial user of any shape or design would cut off competition from products of like design and shape." *Two Pesos*, 505 U.S. 774-75. That doctrine denies protection to even a unique and unusual product design if the design is one of only a few efficient choices and if protection of that design would place competitors at a significant non-reputational disadvantage. *Id.* The functionality doctrine thus limits undue harm to competition under the *Seabrook* test or any other test.[12]

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[12] For the same reason, contrary to the argument advanced by the Private Label Manufacturers Association (Br. 23-24), there is no need to have a higher burden of proof for protection of a "line" of products. On the contrary, a "line" of products (for example, a group of distinctive furniture items) includes individual products that are themselves unique and unusual but that, seen together,

The ability of producers and their competitors to distinguish their products from one another ultimately redounds to the benefit of consumers. Indeed, because the *Seabrook* test affords immediate protection to unique and unusual designs, it encourages producers to create product designs that are distinct from those of their competitors and thereby instantly recognizable. Accordingly, consumers will be better able to make choices between competing products and services. *See Qualitex*, 514 U.S. at 163-64 (a central purpose of the Lanham Act is to allow consumers to distinguish between different sources of products and services). In addition, to the extent that the *Seabrook* standard allows producers to identify more easily the designs that will be afforded immediate protection, they can make those designs a higher quality, having the assurance that they will obtain the reputational benefits that flow from such designs. *See Qualitex*, 514 U.S. 164 (a central goal of the Lanham Act is to encourage the provision of high quality products and services).

B. The protection provided to inherently distinctive product designs does not conflict with the policies of the federal copyright or patent statutes. To begin with, the Copyright Act, by its own terms, recognizes that rights accorded under other *federal* statutes are in addition to those granted by copyright law, and, therefore, nothing in the Copyright Act limits rights granted under the Lanham Act. *See* 17 U.S.C. § 301(d); 1 McCarthy § 6:14. Moreover, in order to prevail on a trade dress infringement claim, the plaintiff must demonstrate both that its trade dress is distinctive and that there is a likelihood of con-

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create a homogenous look that also is unique and unusual. This use of inherently distinctive products to create *another* inherently distinctive product—the line of goods—should be entitled at least as much protection, if not more. Indeed, were a line of products to receive less protection, it would encourage competitors to copy a *greater* number of products in order to increase the burden of proving infringement.

fusion. *See, e.g., Two Pesos*, 505 U.S. at 769. Under copyright law, neither of these elements is required. Therefore, federal trade dress protection does not interfere with the rights provided by the Copyright Act. *See, e.g., Ashley*, 187 F.3d at 376-77; 1 McCarthy §§ 6:13-:14.

The requirements of the Lanham Act are likewise different from those under the patent laws. As the court explained in *In re Mogen David Wine Corp.*, 328 F.2d 925, 930 (C.C.P.A. 1964), "[t]rademark rights or rights under the law of unfair competition do not extend the patent monopoly, [rather], they exist independently of it, under different law and for different reasons. The termination of either has no legal effect on the continuance of the other." *Accord Midwest Indus., Inc.* v. *Karavan Trailers, Inc.*, 175 F.3d 1356, 1362-63 (Fed. Cir.), *cert. denied*, 1999 U.S. LEXIS 7790 (1999). Although the Lanham Act does grant certain rights to designs that are not patentable under the Patent Act, those rights are tied, not just to the distinctiveness of the design, but to the likelihood of consumer confusion. *See, e.g., Ashley*, 187 F.3d at 376; 1 McCarthy §§ 6:8, 6:11. Thus, while a patent protects against copying regardless of possible consumer confusion, a trademark does not, and thus does not offer "monopoly" rights within the meaning of the patent law. *See, e.g., W.T. Rogers Co.* v. *Keene*, 778 F.2d 334, 337 (7th Cir. 1985) (Posner, J.); 1 McCarthy §§ 6:8, 6:11. Furthermore, to the extent that there is any tension between the scope of protection under the patent statute and the scope of protection under the Lanham Act, the functionality doctrine resolves it. *See generally* 1 McCarthy §§ 7:63-64; *see supra* p. 25. As this Court has explained: "[t]he functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to

control a useful product feature." *Qualitex*, 514 U.S. at 164; *accord Two Pesos*, 505 U.S. at 774-75.

IV. THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE AFFIRMED

With respect to the judgment in this case, we agree with the United States (Br. 28) that the Second Circuit, in finding the clothing at issue inherently distinctive, erred by relying on evidence of respondent's intent. Pet. App. 9-10. We disagree, however, that the case needs to be remanded. Looked at as a whole, the record below provides sufficient justification for affirming the judgment in favor of respondent under the *Seabrook* test.

Respondent's complaint claimed that the overall appearance of its children's clothing designs was "unique" and distinctive. JA 19 ¶ 40. At trial, petitioner admitted that there were an "infinite" number of ways to design children garments with seersucker fabric, common children themes, a collar and appliques. JA 61. Moreover, the evidence demonstrated that respondent's trade dress, which *combined* these elements, was unique and unusual in the marketplace, and even petitioner characterized that trade dress as having "the Samara look." JA 62-64, 69-70, 77-78, 81, 85, 98-99, 110, 117-18. In this regard, third party children's garments were introduced into evidence. *E.g.*, JA 62-64; Pet. App. 12-14 & nn.2-3, 47-48. At the conclusion of trial, the jury was then instructed to consider whether respondent's trade dress was common or unusual and, in doing so, to consider market context. JA 143. The jury returned a verdict finding that respondent's trade dress was "protectable." JA 152.

In denying a motion to set aside the jury verdict, the district court held that the record supported a finding that the trade dress was inherently distinctive under the *Seabrook* test. Indeed, the district court expressly cited to and relied upon *Seabrook*, holding that the jury properly

could have concluded that the trade dress was inherently distinctive based upon the comparison of respondent's garments with other garments in the marketplace. *See* Pet. App. 46-49. In short, the district court held that the jury could have reasonably concluded that respondent's trade dress was inherently distinctive under the standards of the *Seabrook* test. *Id.*

The Second Circuit—while not directly relying on the *Seabrook* test—nonetheless invoked similar principles in deciding to affirm. The Second Circuit noted that its prior decision in *Landscape* had held that the "overall look" of a product may be inherently distinctive, Pet. App. 12, and *Landscape*, in turn, had stated that the *Seabrook* test is always relevant and may be sufficient to decide the distinctiveness issue. *Landscape*, 113 F.3d at 378 n.3. While the plaintiff in *Landscape* had failed to indicate what "unique combination of features" of its product would be "likely perceived by consumers as bearing the stamp of their maker," Pet. App. 11-12, the Second Circuit held, in this case, that respondent, by contrast, had "sufficiently depicted" such a "distinctive combination of ingredients," and that, "as a whole, the record divulges . . . specific elements . . . which, when combined, create a distinctive overall look." *Id.* 12, 14-15. In support of that holding, the court pointed to the "dozens of garments submitted by both parties," *id.* 12-15 & nn.2-3—the same evidence that the district court had relied upon in holding that the record supported a finding of inherent distinctiveness.

Thus, by its own lights, the Second Circuit, like the district court, concluded that the record supported a finding that respondent's trade dress met the basic elements of the *Seabrook* test: that is, that it stood out in its field. To be sure, the Second Circuit did refer to respondent's intent in distinguishing the instant case from *Knitwaves*, but that discussion is not connected to its determination that the record, including the evidence of other garments

in the field, was sufficient to support a finding that respondent's trade dress created a "distinctive overall look." That view of the record makes the issue of intent superfluous. Accordingly, we submit that this Court should affirm the judgment below based on the *Seabrook* test.[13]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[13] Petitioner claims (Br. 38-45) that the judgment should be reversed, because respondent's trade dress lacks uniformity and the Second Circuit misapplied its own standard. We offer no opinion on the merits of these claims because they are outside the scope of the question presented.